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In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

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LIBRARY SERVICES

v.

THE FREE SPEECH COALITION, ET AL.,

Respondens.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of the *Petitioners*

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OF
THE NATIONAL LEGAL FOUNDATION
in support of the *Petitioners*

Pursuant to Rule 37.3(b) of the Rules of this Court, The National Legal Foundation respectfully moves the Court for leave to file a brief *amicus curiae* in *Ashcroft, et al. v. Free Speech* Coalition, et al., No. 00-795. The respondent, Free Speech Coalition, has refused to consent to the filing of the brief *amicus curiae*. The petitioner, Attorney General John Ashcroft, has consented to the filing of the brief *amicus curiae*.

The National Legal Foundation is a public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. In this capacity, The National Legal Foundation is gravely concerned about the threat that virtual child pornography poses to the family and to society in general. This issue is also of grave concern to the supporters of The National Legal Foundation.

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is a public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. In this capacity, The National Legal Foundation is gravely concerned about the threat that virtual child pornography poses to the family and to society in general. This issue is also of grave concern to the supporters of The National Legal Foundation.

SUMMARY OF THE ARGUMENT

At issue in this case is the constitutionality of the Child Pornography Protection Act of 1996 (CPPA). Amicus believes that the CPPA is constitutional. However, the Ninth Circuit relied heavily upon this Court's opinion in *New York v. Ferber,* 458 U.S. 747 (1982) in holding the CPPA unconstitutional.

Amicus does not believe that the Ninth Circuit read *Ferber* correctly. However, Amicus recognizes that this Court could decide that the Ninth Circuit did read *Ferber* correctly, either in whole or in part. Therefore, this brief will show that even if the Ninth Circuit has understood *Ferber* correctly, this Court can still hold the CPPA constitutional.

Specifically, this brief will suggest that this Court should do the following things if it believes that the Ninth Circuit correctly interpretted *Ferber*: First, this Court should examine *Ferber's* live performance requirement

in light of the changes in technology since *Ferber* was decided. Second, this Court should clarify that despite the live performance requirement of *Ferber*, virtual child pornography is still obscene and therefore is not protected speech. Third, this Court should emphasize that the *Ferber* opinion was dealing with a different statute, one that required live use. Therefore, the *Ferber* court rationale should not serve as a limitation in this case since the statute at issue here proscribes a different type of child pornography. Fourth, *Ferber* needs to be revisited in order to clarify how its rationale should interact with the secondary effects rationale articulated by this Court in subsequent cases. Fifth, this Court should clarify *Ferber's* discussion of pornographic simulations. In addition, this Court should clarify what appears to be inconsistencies or at least internal tensions within the opinion. These inconsistencies appear to have impacted the Ninth Circuit's analysis in multiple ways.

If this Court will take these actions, the constitutionality of the CPPA will become obvious. Thus, even if this Court decides that the Ninth Circuit read all or part of *Ferber* correctly, this Court can still uphold the CPPA.

ARGUMENT

At issue in this case is the constitutionality of the Child Pornography Protection Act of 1996 (CPPA). Amicus believes that the CPPA is constitutional. This brief will examine one sub-issue under this larger issue: why this Court

should uphold the CPPA even if it decides that the Ninth Circuit Court of Appeals correctly read this Court's decision in *New York v. Ferber,* 458 U.S. 747 (1982), to require a finding of unconstitutionality. *See Free Speech Coalition v. Reno*, 198 F.3d 1083, (9th Cir. 1999).

The Ninth Circuit relied heavily upon *Ferber* and its rationale in striking down the CPPA. At the heart of the Ninth Circuit's reading of *Ferber* is its understanding that *Ferber* requires statutes that criminalize child pornography to limit the offense to works that use real, recognizable children in the production of the work. *Id.* at 1092. This brief will examine the possibility that the Ninth Circuit read this and related portions of *Ferber* correctly—in whole or in part—and suggest how and why this Court should clarify, modify, or overturn those portions of *Ferber* upon which the Ninth Circuit relied in order for this Court to uphold the constitutionality of the CPPA.

In reality, Amicus does not believe that the Ninth Circuit read *Ferber* correctly. Rather, Amicus believes that other courts, which have read *Ferber* in a less limiting light, are correct. For example, three other courts of appeals and one district court have not interpreted *Ferber* so narrowly as to prohibit only pornography produced with actual children. *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Pearl*, 89 F. Supp. 2d 1237 (N.D. Utah 2000). These courts have taken

a broad approach to interpreting *Ferber* and have not seen any conflict between the *Ferber* rationale and upholding the CPPA's prohibition of virtual pornography.

However, Amicus recognizes that this Court could decide that the Ninth Circuit did read *Ferber* correctly. Therefore, this brief will address what this Court should do, in light of technological change and the opinions of this Court in other pornography cases, to clarify and modify *Ferber*.

If the Ninth Circuit correctly interpreted *Ferber*, then *this Court* will need to revisit that opinion for several reasons. First, the live performance requirement needs to be examined in light of the changes in technology since *Ferber* was decided. Second, despite the live performance requirement of *Ferber*, virtual child pornography is still obscene and therefore is not protected speech. Third, this Court should emphasize that the *Ferber* opinion was dealing with a different statute, one that required live use. Therefore, the *Ferber* court rationale should not serve as a limitation in this case since the statute at issue here proscribes a different type of child pornography. Fourth, *Ferber* needs to be revisited in order to clarify how its rationale should interact with the secondary effects rationale articulated by this Court in subsequent cases. Fifth, this Court should clarify *Ferber's* discussion of pornographic simulations. In addition, this Court should clarify what appears to be inconsistencies or at least internal tensions within the opinion. These inconsistencies appear

to have impacted the Ninth Circuit's analysis in multiple ways.

I. THE LIVE PERFORMANCE REQUIREMENT SHOULD NOT BE FOLLOWED BY THIS COURT BECAUSE IT IS INAPPLICABLE TO THE CPPA, PORNOGRAPHY TECHNOLOGY HAS CHANGED SINCE *FERBER*, AND THE MATERIAL PROSCRIBED BY THE CPPA IS OBSCENE.

A. This Court should not follow the live performance "requirement" because, unlike the instant case, *Ferber* was reviewing a statute proscribing live use.

The reason the *Ferber* Court emphasized live use of actual children is because that was what the statute before the Court was proscribing. *Ferber*, 458 U.S. 747, 750-51 (construing N.Y. Penal Law, Art. 263 (McKinney 1980)). Therefore, the Court's discussion was naturally limited to live use. As will become apparent in the discussion below, when the *Ferber* Court distinguished between live use and other technologies, it did not have in view the technologies proscribed by the CPPA. In *Ferber*, this Court distinguished between pornography derived from live performances by children, on the one hand; and simulations, editing, and use of young-looking adults on the other hand. *Id.* at 762-63. This Court was not distinguishing between pornography derived from live

performances by children and pornography based on the technologies targeted by the CPPA, namely virtual pornography and morphing of images of actual children.

Thus, this Court could emphasize that the *Ferber* limitation is only applicable to situations in which distinctions such as those actually in play in *Ferber* are involved. In other words, this Court could hold that the *Ferber* rationale, while correctly articulated by the Ninth Circuit, was inappropriately applied by that court to the CPPA.

B. While *Ferber* seems to require a live performance, this requirement no longer applies because the technology has changed since that decision.

However, this Court has another option. It could simply declare that because of changing pornography technology, the distinction upon which the *Ferber* rationale is based is no longer workable. In that case, this Court could simply uphold the CPPA under other precedents of this Court (see below) or it could adopt a more workable distinction, one that is more likely to stand up to changing technology. (However, in light of the ever changing technology, Amicus believes that finding a new workable distinction may be problematic.)

C. Even if the pornographic images of children do not involve a live performance they are still obscene and are not protected.

This Court should also emphasize that even if the Ninth Circuit read the live performance rationale correctly, it ignored a critical element of the *Ferber* Court's calculus. The Ninth Circuit wrote: "While the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct 'which do not involve live performance or photographic or other visual reproductions of live performances, retains First Amendment protection.'" *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999) (quoting *New York v. Ferber*, 458 U.S. 747, 765 (1982)). However, by looking at the whole sentence in *Ferber* upon which the Ninth Circuit relied, one discovers the missing element. The *Ferber* Court stated: "We note that the distribution of descriptions or other depictions of sexual conduct, *not otherwise obscene*, which do not involve live performance or photographic or other reproduction of live performances, retains First Amendment protection." *Ferber,* 458 U.S. at 765 (emphasis added). Thus, this Court could decide that the Ninth Circuit correctly read the live performance requirement yet once again misapplied it, since the child pornography proscribed by the CPPA is otherwise obscene. After all, the *Ferber* Court itself wrote that "[r]ecognizing and classifying child pornography as a category of material outside the protection of

the First Amendment is not incompatible with our earlier decisions." 458 U.S. at 763-64 (1982).

D. In evaluating the Ninth Circuit's reading of *Ferber*, this Court should bear in mind possible internal inconsistencies in the *Ferber* opinion.

To the extent that the Ninth Circuit correctly understood *Ferber's* live performance requirement to compel a finding of unconstitutionality, this Court should acknowledge that this portion of *Ferber* is inconsistent with other portions of *Ferber* and over turn that part of *Ferber*. In other words, many other portions of *Ferber* clearly indicate that the CPPA is constitutional. First, the *Ferber* Court declared child pornography to have only *de minimus* value of the work. *Id.* at 762. Second, this Court stated child pornography gets less protection than that provided by the *Miller* test because "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nonetheless embody the hardest core of child pornography." *Id.* at 761 (quoting *Miller v. California,* 413 U.S. 15 (1973)). Furthermore, as previously mentioned, the *Ferber* Court also emphasized that obscene material such as child pornography has no First Amendment protection at all. *Id.* at 763-64.

All of these statements by this Court, if applied to the CPPA, would lead to a finding of constitutionality. Therefore, if this Court believes that the Ninth Circuit correctly determined that

the live performance requirement compelled a finding of unconstitutionality, this Court should explicitly overturn or modify the live performance requirement.

II. THE DIRECT HARM RATIONALE OF *FERBER* SHOULD NOT BE SEEN AS THE ONLY POSSIBLE RATIONALE UNDER WHICH THE CPPA CAN BE UPHELD.

The second major element that the Ninth Circuit relied upon in interpreting *Ferber* was a direct harm requirement. *Free Speech*, 198 F.3d at 1092. According to the Ninth Circuit, *Ferber* discusses only the direct harm caused to children used in the creation of the pornographic images. The *Ferber* court never discuses or even hints at any secondary effects that can occur to children who are not used in the creation of the images. *Id.*

Here too, the Ninth Circuit may have correctly read *Ferber*. The *Ferber* Court wrote that "[t]he legislative judgment, as well as the judgment found in relevant literature, is that the *use of children as subjects of pornographic materials* is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." 458 U.S. at 758. The Ninth Circuit pointed out that "the state's interest was in safeguarding the physical and psychological well-being of a minor." 198 F.3d at 1092.

According to the Ninth Circuit's reading of *Ferber,* the CPPA's ban on virtual child pornography must fall because of its lack of direct harm to children. However, should this Court accept the Ninth Circuit's reading of *Ferber*, it should nonetheless uphold the constitutionality of the CPPA for the following reasons.

A. The direct harm rationale was derived from the nature of the statute before the *Ferber* Court.

As mentioned previously, the *Ferber* court was dealing with a New York statute punishing the actual use of children in the creation of child pornography. *Ferber*, 458 U.S. at 750-51. New York, therefore, naturally justified the statute by the direct harms inflicted upon the children used in the production of the pornography. The Ninth Circuit correctly pointed this out. However, simply because the *Ferber* court accepted and discussed New York's justification does not mean that the CPPA cannot be upheld on any other grounds. Thus, the Ninth Circuit's mistake was not necessarily in its reading of what *Ferber* said about direct harm to children. Rather, its error was to limit itself to that rationale and to its understanding of the implications of that rationale. As will be discussed below, this Court should address both of these problems.

B. *Ferber's* direct harm rationale should not be used as a shield for pornography technology that did not exist when *Ferber* was decided.

The Ninth Circuit acknowledged that pornography technology has advanced in recent years when it noted that Congress added the "appears to be" language to the CPPA because of the new technology. The Ninth Circuit stated "[t]he Senate reasoned that advances in technology distinguished the *Ferber* Court's holding because in 1982 when *Ferber* was decided 'the technology to produce visual depictions of child sexual activity indistinguishable from unretouched photographs of actual children engaging in 'live performances' did not exist." *Free Speech Coalition*, 198 F.3d at 1095 (quoting S. Rep. No. 104-358, at 21 (1996)).

Assuming *arguendo* that the Ninth Circuit was correct in its assertion that the pornography targeted by the CPPA does not produce direct harm to children, that court was nonetheless incorrect to conclude that the CPPA could not be upheld on other grounds. Therefore, this Court should explicitly hold that the CPPA can be upheld under a secondary effects rationale.

This Court should clarify that there is no conflict between its decision in *Ferber* and its decision in *Osborne v. Ohio*, 495 U.S. 103, (1990). In *Osborne,* this Court's rationale was based upon, not only primary effects harm but also, the secondary effects that child pornography

can have when pedophiles use it to seduce children. *Id.* at 111. The *Osborne* opinion relied on the results of the Attorney General's Commission on Pornography's *Final Report*, which was issued in 1986. *Id.* This report was not available to the *Ferber* court in 1982.

It is true that *Osborne* involved a live use statute, *Id.* at 106, but the secondary effects argument logically applies to either a live use statute or a virtual pornography statute. Indeed, additional government studies have shown just that and have been relied upon by lower federal courts to uphold the CPPA.

Three courts of appeals and one district court have all relied on a secondary effects argument to support the ban on virtual pornography. In *United States v. Acheson*, the Court of Appeals for the Eleventh Circuit upheld the CPPA and stated "virtual pornography is a powerful tool in pedophiles' arsenals as 'a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity.'" 195 F.3d 645, 649 (11th Cir. 1999) (quoting CPPA, Pub.L.No 104-208, §1(3), 110 Stat. 3009-26 (1996)). In *United States v. Hilton*, the Court of Appeals for the First Circuit upheld the CPPA and discussed several secondary effects harms. One unique danger and harm mentioned in that opinion was "[i]mages made by manipulating an innocent picture of a real child to show sexual conduct can also be used to blackmail that child into

submitting to abuse and remaining in fearful silence about it." 167 F.3d 61, 67 (1st Cir. 1999). In *United States v. Pearl*, 89 F. Supp. 2d 1237, 1244 (N.D. Utah 2000), the U.S. District Court for the District of Utah upheld the CPPA's ban on virtual pornography and specifically noted the CPPA's Congressional Findings stating that the danger to children is just as great with real or virtual images. The *Pearl* court then declared "[s]urely, the easily created and massive proliferation of computer generated child pornography will result in more frequent use of those images to harm real children." *Id.* In supporting this argument, the court pointed to the testimony of several congressional witnesses who stated the danger to actual children who are seduced or molested with the aid of sexually explicit pictures is as great when virtual pictures are used as when unretouched photos are used. *Id.* at 1245.

Thus, here again the Ninth Circuit's error may not have been its reading of *Ferber*. Rather, its error was its refusal to examine the CPPA in light of both *Ferber* and *Osborne*. In particular, the Ninth Circuit refused to acknowledge the CPPA's Congressional Findings on the secondary effects dangers of virtual pornography. This was exactly the criticism leveled against the Ninth Circuit, by the *Pearl* court. According to that court "[t]hese Congressional Findings were basically brushed aside in the Ninth Circuit's Free Speech Coalition case . . ." 89 F. Supp. 2d at 1245.

Therefore, even if this Court believes that the Ninth Circuit correctly read the direct harm rationale, it should explicitly declare that that is not the only possible analysis to apply to the CPPA. This Court should uphold the CPPA under a secondary harm analysis.

C. <u>This Court should also modify or clarify *Ferber's* discussion of the use of adults who look like minors.</u>

Considering the evidence of the secondary effects, one might think that the Ninth Circuit was without excuse in excluding the secondary effects argument in its rationale. The Ninth Circuit, though, was not ignorant of the secondary effects argument. In fact, the Ninth Circuit saw the *Ferber* holding as an insurmountable roadblock to accepting any secondary effect arguments. The Ninth Circuit believed that the "vulnerability argument [*i.e.*, the secondary effects argument] makes no constitutional sense in light of *Ferber's* acknowledgment that adults who look like minors can be used in sexually explicit 'art' or film depictions." *Free Speech Coalition*, 198 F.3d at 1094.

This Court should either explain how the Ninth Circuit misunderstood the implications of the secondary effects rationale or, if this Court believes that the Ninth Circuit was correct on the implications, it should modify any portions of *Ferber* that cannot stand in the face of the Congressional Findings.

1. The context of the "use of adults" exception shows that it is not in conflict with the secondary effects rationale.

While the Ninth Circuit may have read the direct harm rationale correctly, and while it correctly pointed out *Ferber's* "use of adults" exception; it may have missed the context and thus seen an incompatibility that does not exist. *Ferber's* "use of adults" exception arose in the context of *Ferber's* discussion of the *value* of child pornography. After deciding that child pornography had only an "exceedingly modest, if not *de minimus*" value, 458 U.S. at 762, the Court continued, saying "we consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of literary performance or scientific or educational work." *Id.* at 763. It was after making this statement that the court added, "as a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who looks younger could be utilized." *Id.*

Contrary to the Ninth Circuit's assertion, there is no inherent incompatibility in allowing a "use of adults" exception for those rare cases in which literary or artistic value may actually be at issue and in upholding the CPPA under a secondary effects rationale. Indeed, logically, the "use of adults" exception would only apply to material that is not otherwise obscene and the

secondary effects rationale would only apply to material without constitutional protection.

It is instructive to remember exactly what the *Ferber* Court was talking about in its discussion of the "use of adults" exception. For support of its "use of adults" exception, the *Ferber* Court cited the Brief of the Petitioner. 458 U.S. at 763. The examples in that Brief are clearly examples of materials with some artistic merit, not examples of obscene, unprotected materials. Specifically, the Brief describes the use of an adult to play the title role in a Broadway production of *Lolita*. It also describes the use of doubles for the then-teen-aged Brooke Shields' nude scenes in the films *The Blue Lagoon* and *Endless Love*. Brief of Petitioner at 25.

2. In the alternative, this Court should modify any portion of *Ferber* that sets the "use of adults" exception in conflict with the secondary effects rationale.

In the event that this Court believes that the Ninth Circuit was actually correct—not only about *Ferber's* direct harm rationale, but also about a conflict between a secondary effects rationale and *Ferber's* "use of adults" exception—this Court should explicitly overturn or modify any portion of *Ferber* necessary to eliminate that conflict. To the extent that the "use of adults" exception prevents a finding of constitutionality, that exception is in conflict with other portions of *Ferber*.

All those portions of Ferber that are possibly in conflict with the live performance requirement (see above), are also implicated by the possible conflict with the "use of adults" exception. As summarized previously, the *Ferber* Court declared child pornography to have only *de minimus* value of the work. *Id.* at 762. The *Ferber* Court also stated that child pornography gets less protection than that provided by the *Miller* test because "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nonetheless embody the hardest core of child pornography." *Id.* at 761 (quoting *Miller v. California,* 413 U.S. 15 (1973)). Furthermore, the *Ferber* Court also emphasized that obscene material such as child pornography has no First Amendment protection at all. *Id.* at 763-64.

All of these statements by this Court, if applied to the CPPA, would lead to a finding of constitutionality. Therefore, if this Court believes that the Ninth Circuit correctly ascertained a conflict between the "adult use" exception and a secondary effects rationale (which conflict results in a rejection of the secondary effects rationale and, therefore, a finding of unconstitutionality), this Court should explicitly overturn or modify those portions of *Ferber* that cannot stand up to the tests of changing technology and the CPPA's Congressional Findings.

III. THIS COURT SHOULD CLARIFY ITS DISCUSSION OF PORNOGRAPHIC SIMULATIONS.

In its decision striking down the CPPA, the Ninth Circuit also relied upon the *Ferber* Court's comment that "[s]imulations outside the prohibition of the statute could provide another alternative [to live performances]." *Free Speech Coalition*, 198 F.3d at 1092 citing *Ferber*, 458 U.S. at 763). Because the Ninth Circuit was correct that this language exists in *Ferber*, this Court should clarify what it meant or explicitly abandon this one sentence.

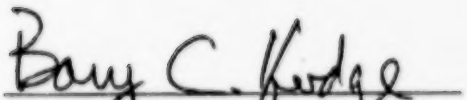
The discussion of the simulations exception occurred in the same section f the *Ferber* opinion as did the "use of adults" discussion. Thus, everything mentioned in part III. of this brief is applicable here. The use of simulations, even under *Ferber* would only apply to materials with artistic merit. Everything that was discussed above about changing technology and secondary effects is equally applicable here.

This Court should emphasize that simulations were discussed as a possible alternative to the use of adults exception. Just as this Court should emphasize that the possibility of the use of adults is not in conflict with upholding the CPPA under a secondary effects rationale, so it should emphasize that the possibility of simulations is not in conflict with upholding the CPPA under that rationale.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed and the CPPA should be declared constitutional.

Respectfully submitted
this 22nd day of April, 2001



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